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NO. 06-1188

# IN THE SUPREME COURT OF THE UNITED STATES

TECK COMINCO METALS, LTD.,

*Petitioners,*

v.

JOSEPH A. PAKOOTAS, DONALD R. MICHEL, AND THE STATE OF WASHINGTON,

*Respondents.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## SUPPLEMENTAL BRIEF FOR THE STATE OF WASHINGTON

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## SUPPLEMENTAL BRIEF FOR THE STATE OF WASHINGTON

Respondent State of Washington submits this supplemental brief pursuant to Rule 15(8), to address a new argument raised by Petitioner Teck Cominco Metals, Ltd. (Teck) in its supplemental brief filed December 4, 2007.

Upon invitation from this Court, the United States agrees with Respondents that Teck fails to meet the criteria for review, and that certiorari should be denied. *See* Brief for the United States as Amicus Curiae (U.S. Br.) at 6-7, 14-20. The United States agrees there is no circuit split on the issue of "arranger liability," nor any important federal question that would warrant interlocutory review despite the preliminary posture of this case. *See* U.S. Br. at 6-7, 14-20.

With one exception, Teck's supplemental brief does little more than repeat its past arguments for why this Court should grant review on the merits. However, based on the United States' suggestion that Respondents' citizen suit claims are moot, Teck now argues for the first time that this Court must grant certiorari to correct an error "once noticed" below, and must vacate the decision below. *See* Supplemental Brief of Petitioner (Pet. Supp. Br.) at 2, 4-6. There is no basis for this claim. Neither mootness nor vacatur were questions presented or relief sought in the Petition for a Writ of Certiorari (Petition). Any potential mootness of some of Respondents' claims does not now provide a separate new basis for this Court to grant certiorari, nor would vacatur even be appropriate under the facts. If anything, potential mootness issues serve to highlight the preliminary posture of this case, which the United States agrees "counsels strongly against this Court's review." *See* U.S. Br. at 6.

### A. Mootness Was Not A Question Presented In The Petition, And Does Not Now Warrant This Court's Review

In 2003 the Environmental Protection Agency (EPA) issued a unilateral administrative order (UAO) to Teck under Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9606(a), which directed Teck to investigate the contamination it caused in the United States and to evaluate alternatives for cleanup. Pet. App. 68a-99a. Respondents brought this action to enforce the UAO. *See* Pet. App. 105a-119a. After the district court certified the appeal, and one month before the court of appeals issued its decision, Teck and EPA signed a settlement agreement and the UAO was withdrawn. *See* Pet. App. 9a n.10. Although Teck argued to the court of appeals that the enforcement action was not moot,[1] it now asserts—for the first time—that this Court must grant certiorari in order to correct an error "once noticed" below. *See* Pet. Supp. Br. at 5. Then, Teck argues, this Court must vacate the decision below since the court of appeals determined that at least two of Respondents' claims were not moot and issued a decision on the merits. *See* Pet. Supp. Br. at 2, 4-6.

There is no basis for Teck's claim. First, the possibility that Respondents' enforcement action is moot is not an independent basis to grant the Petition. If this Court grants review in a case, it will take notice of defects in jurisdiction. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997). However, this Court does not ordinarily grant review simply to correct lower court errors—jurisdictional or otherwise. Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted

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[1] *See* Pet. App. 9a n.10 (noting the parties' positions on this point).

error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). Teck's Petition does not set forth adequate grounds to justify granting it. Teck's eleventh hour claim on mootness cannot bootstrap the case into being worthy of certiorari.

Second, Respondents were not party to the separate settlement reached between EPA and Teck, which exists outside the context of this litigation. *See* Pet. App. 9a n.10. The effect of this separate agreement and of EPA's withdrawal of its UAO on the enforcement action is factually complex. Given this complexity, the parties disagreed below on the effect of these events on the enforcement action, but did agree that claims for penalties and fees at minimum were not automatically moot. *See* Pet. App. 9a n.10. The court below did not err in reaching this same conclusion at the urging of all parties. It is possible that subsequent fact-finding below could support a claim for penalties and fees. *See Friends of the Earth v. Laidlaw*, 528 U.S. 167 (2000).[2]

The United States did not participate below. Its suggestion that there is no possibility for an award of penalties is based on its own factual statements analyzing the terms of EPA's settlement with Teck and weighing the likelihood that violations could recur. *See* U.S. Br. at 10-11. Notably, the terms of the settlement agreement

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[2] The Defendant in *Laidlaw* took voluntary action to comply with a permit and then closed the facility subject to the citizen suit, but this Court still noted the suit was not moot unless "one or the other of these events made it *absolutely clear* that [Defendant's] permit violations could not be reasonably expected to recur," and left open for consideration on remand what effect these events had on the prospect of future violations because it was a disputed factual matter that had not been aired in the lower courts. *Laidlaw*, 528 U.S. at 193-194 (emphasis added).

are not part of the record before this Court on review.[3] The inquiry regarding the effect of the separate settlement and withdrawal of the UAO goes to whether penalties and fees should be awarded under the facts of the case, which may be in dispute and which have not yet been aired below. It would be remarkable for this Court to resolve the factual questions involved in this issue in the first instance based on the factual representations of an amicus curiae—even the United States.

Third, even though the United States suggests that the enforcement action may be moot, the United States argues *against* certiorari being granted and consequently—assuming Respondents even continue their claims for penalties and fees below—the district court can best explore these facts in the first instance to determine whether they warrant any relief.

In short, the fact that potential mootness was not a question presented in the Petition and is predicated upon events requiring factual inquiry, further highlights the need for subsequent proceedings below and counsels against review at this level now. *See* U.S. Br. at 6 (agreeing that "[t]he current posture of this case therefore counsels strongly against this Court's review").

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[3] Although the court below took judicial notice of the fact the agreement had been reached, it declined to take notice of any supplemental argument relating to the terms of that agreement. Pet. App. 9a n.10. Likewise, Respondents' amended complaints (upon which Teck relies to argue that its "appeal" is not moot even if the citizen suit claims are, *see* Pet. Supp. Br. at 2-4) are not part of the record before this Court. *See* Pet. App. 9a n.10.

### B. Vacatur Is An Extraordinary Remedy That Would Not Be Warranted In Any Event

Following the United States' view that certiorari should be denied, Teck now switches track to argue for the first time that the decision below must be vacated. *See* Pet. Supp. Br. at 4-6. Teck contributed to any potential mootness, however, and its desire to avoid an unfavorable decision does not justify the extraordinary remedy of vacatur.

The underlying basis for a request for vacatur should be considered in light of both equity considerations and the public interest. *See U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 22-27 (1994) (clarifying the *Munsingwear* standard for when a lower court decision should be vacated based on mootness). The "principal condition to which [this Court] look[s] is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Id.* at 24. If so, "denial of vacatur is merely one application of the principle that '[a] suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks'," and the request should be denied unless exceptional circumstances exist because both a failure of equity and the public interest weigh against it. *See id.* at 24-29 (citation omitted) (noting that judicial precedents are presumptively correct and are not merely the property of private litigants).

Teck cites *Deakins v. Monaghan*, 484 U.S. 193 (1988), and other cases that address the extent to which decisions below should be vacated, but misconstrues the real question of when vacatur is even warranted. *See* Pet. Br. at 5-6. In *Deakins* this Court vacated *in part* the decision below, but did so based on circumstances entirely distinguishable from this case. *See Deakins*, 484 U.S. at 199-201. Only that portion of the decision below finding the district court need not have abstained from hearing respondents' equitable claims for relief regarding the

illegal seizure of business documents in a state criminal investigation was vacated, and the case was remanded with instructions to dismiss those claims with prejudice, because this Court wanted to ensure that respondents could not renew these claims in federal court after representing they would permanently withdraw their claims and go seek relief in state court.[4]

There is no such basis for vacatur here. Teck argues it did not intend to moot its own appeal, and that vacatur is appropriate so it can avoid an unfavorable interlocutory decision on liability. *See* Pet. Supp. Br. at 6. This argument is unavailing. Although the United States cites withdrawal of the UAO as the allegedly mooting event, this event was predicated upon the separate settlement reached between Teck and EPA. *See* U.S. Br. at 4, 10. That Teck played an active role in these events cannot be denied, despite Teck's disclaimer of any unintentional effect in undermining its own appeal.

Moreover, Teck took the position before the court of appeals that the enforcement action was not moot. *See* Pet. App. 9a n.10. Teck now collaterally attacks the decision below, merely to avoid being bound if it fails to secure review on the merits. Teck's self-interest does not constitute an exceptional circumstance warranting vacatur, however, and Teck should not be allowed to subvert the appellate process to its own advantage. *See Bonner Mall*, 513 U.S. at 27 ("To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the

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[4] Notably, this Court distinguished the *Deakins* case from one in which a petitioner voluntarily ceases its challenged conduct but may nevertheless "return to his old ways," because the Court had the power to guarantee that the feared conduct (the pursuit of the federal litigation) could not resume. *See Deakins*, 484 U.S. at 201 n.4. No similar "guarantee" exists in this case.

judgment would—quite apart from any considerations of fairness to the parties—disturb the orderly operation of the federal judicial system.").

## C. Conclusion

For the foregoing reasons, the Court should deny the Petition for a Writ of Certiorari.

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